

2004 IN REVIEW: IMPORTANT DEVELOPMENTS FOR MASSACHUSETTS EMPLOYERS

Employment law in Massachusetts is typically dynamic and 2004 was no different. There were several significant developments including legal recognition for same-sex marriages and a ban on workplace smoking. This end-of-the-year issue of the ELA will recap these and other important developments, as well as provide practical advice for employers in dealing with these new changes.

1. SAME-SEX MARRIAGES RECOGNIZED IN MASSACHUSETTS

In May 2004, the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health* took effect. That decision holds that denying same-sex couples the right to marry violates the state's constitution. Because federal laws and regulations recognize only the validity of opposite-sex marriages, *Goodridge* has limited effects for employers with regard to benefits and policies governed by federal laws. For example, employers are not required to extend health benefits under self-insured, ERISA-covered plans to same-sex couples, and *Goodridge* is unlikely to require that an employer extend FMLA benefits to same-sex spouses (although this issue may be litigated).

Goodridge will, however, affect employment policies and practices in the following significant ways:

- Unlike self-insured group health plans, insured health care plans and life insurance plans are generally subject to state -- not federal -- regulation, and the state's definition of marriage will likely govern the provision of these benefits.
- Employment policies not covered by ERISA that make reference to "spouse," such as bereavement policies, must be applied to same-sex spouses.
- Employees with same-sex spouses may now have greater rights to limited leave under the Massachusetts Small Necessities Leave Act.
- Employers who currently offer benefits to same-sex domestic partners may revisit their decision, given that there is no longer a bar to same-sex marriage. If an employer chooses to continue such benefits, they must be offered equally to employees in opposite-sex domestic partnerships.

Employers also need to be alert to inappropriate responses of co-workers and supervisors to same-sex marriages. Although *Goodridge* does not create a new "protected class" of employees, sexual orientation is a protected class under pre-

existing Massachusetts law. Employers must treat same-sex married couples in the same manner as heterosexual couples for the purpose of state laws and, therefore, must take steps to prevent possible harassment.

2. WORKPLACE SMOKING BANNED

A new Massachusetts law that prohibits smoking in almost all workplaces took effect in July. Generally, employers having one or more employees are responsible for providing a smoke-free environment for all employees working within an enclosed workplace. Other key points of the new law include:

- Designated smoking areas are not permitted.
- Employers subject to the law may not discriminate or retaliate against anyone for making a complaint of a violation of the law.

To ensure compliance with the new law, employers should inform employees of the change if the employer has permitted smoking in the workplace in the past. In addition, employers must also post "no smoking" signs conspicuously. Written non-smoking policies are not required unless the employer is within the City of Boston.

3. NEW "PROTECTED CLASS" STATUS UNDER STATE LAW FOR MEMBERS OF THE MILITARY

On September 23, Governor Romney signed into law an amendment to the state's anti-discrimination statute, Chapter 151B. The amendment created a new category of protected employees: current or prospective employees who are enrolled in any branch of the military, including the reserve forces and the National Guard. The law encompasses both current members of the military and those who have "appli[ed] to perform" military service. Massachusetts' employers are prohibited from discriminating against members of this new protected class in hiring, retention, promotion, and benefits. Moreover, Massachusetts employers are subject to the full panoply of employee rights and potential claims for violations of this new provision.

4. ENFORCEABILITY OF NON-COMPETES AFFECTED BY CHANGES IN POSITIONS

Three Massachusetts trial court judges refused to enforce non-compete agreements signed by employees at the time of hire because the employees had changed positions during employment. Consequently, employers can no longer assume that a non-compete agreement will continue to be valid following a material change in the employee's job.

To ensure that the employee is subject to a valid non-compete, employers should consider having key employees execute new non-compete agreements following changes in position.

Because this may be administratively difficult, employers also can take the following steps -- short of executing new non-competes -- to increase the likelihood that agreements executed at the time of hire will remain enforceable:

- Consider requiring, at the time of the employee's promotion, that the employee sign an acknowledgment that any previous restrictive agreements remain in effect.
- Include in all restrictive agreements language that the covenant will remain in effect for the entire period of employment and will be unaffected by changes in position.

5. CHANGES TO STATE UNEMPLOYMENT AGENCIES

The Division of Employment and Training was separated into the Division of Unemployment Assistance and the Division of Career Services. Massachusetts law requires that employers post in the workplace a notice containing information about unemployment, and also provide terminated employees with a pamphlet informing them how to file an unemployment claim. These notices have been revised slightly to reflect the change. Employers can obtain the revised workplace poster and notification pamphlet at: <http://www.detma.org/fpworkplace.htm>

6. MCAD'S BOSTON OFFICE ELIMINATES PRE-DETERMINATION DISCOVERY

The Boston Office of the Massachusetts Commission Against Discrimination issued a new Standing Order that took effect on July 1st, which eliminated pre-determination discovery by parties. The pre-determination process of handling a complaint of discrimination is now limited to the filing of a complaint, the filing of a position statement by the employer, and the opportunity for the complainant to submit a response. Following these preliminary steps, the Commission itself will determine whether further fact investigation is necessary, issue requests for information to one or more parties, and decide whether to hold an investigative conference. While it remains to be seen what impact these changes will have, we believe that the costs to defend claims at the MCAD will be reduced.

7. HEIGHTENED STANDARD FOR EMOTIONAL DISTRESS DAMAGES IN EMPLOYMENT CASES

In the case *Stonehill College v. MCAD*, the Supreme Judicial Court of Massachusetts adopted a heightened standard that plaintiffs must meet to obtain emotional distress damages. Prior to the ruling, courts and the MCAD routinely had presumed that a plaintiff suffered emotional distress following a finding of discrimination or retaliation. In *Stonehill College*, the SJC ruled that "a finding of discrimination, or retaliation, by itself, is no longer sufficient to permit an inference of, or a

presumption of, emotional distress." Rather, before making such an award, the factfinder must determine that the employer caused the distress and award damages only for that harm caused by the employer.

8. TIP STATUTE AMENDED

An amendment to the Massachusetts law governing service charges and tips took effect in September. Under the amended statute, employers may implement and administer a tip pool, provided that only wait staff employees, service employees, and service bartenders participate. In addition, the amended law authorizes the use and distribution of administrative fees or so-called "house fees" to compensate non-waitstaff personnel, as long as the employer provides "a designation or written description of the house or administrative fee, which informs the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders."

9. DOL ISSUES NEW OVERTIME REGULATIONS

The U.S. Department of Labor issued new regulations regarding what are commonly known as the "white-collar" exemptions to the Fair Labor Standards Act overtime requirements. The regulations became effective on August 23. While too numerous to discuss in full in this ELA, key changes include:

- A new exemption for certain highly paid employees who receive total annual compensation of at least \$100,000.
- An increase in the salary threshold for executive, administrative and professional employees to \$455 per week.
- Simplification of the "duties" tests for exemption from overtime for executive, administrative, professional, computer and outside sales employees.

10. NEW COBRA NOTICE PROCEDURES

In May, the U.S. Department of Labor published final regulations that updated notice and disclosure requirements for group health plan administrators under COBRA. These new regulations apply notice and disclosure obligations which arise on or after the first day of the first plan year beginning on or after November 26, 2004. The new regulations require a slightly revised Initial Notice and Election Notice and create two new notices that will be used in cases of unavailability of coverage and early termination of coverage.

Please contact us if you have questions or want additional information concerning any of these developments.

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